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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 316.

In the Matter

of

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY,

Debtor.

CHARLES W. MULCAHY, Trustee of Boston and Providence Railroad Corporation,

Petitioner.

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

There was no written opinion of the District Court of the United States for the District of Connecticut on the Consummation Order and Final Decree appealed from, but that Court's views on the matter will be found at R. 108-113.[1] The opinion of the Court of Appeals for the Second Circuit (R. 209-219) is reported in 169 F. (2d) 337.

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[1] This and similar references, including folio citations in certain instances, are to the Transcript of Record filed in this Court.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 29, 1948 (R. 220-221), but the petition was not filed in this Court until the ninety-first day thereafter (viz. September 28, 1948) despite the jurisdictional requirement in 28 U. S. C. A., Sec. 2101(c), that any such petition must be filed "within ninety days after the entry of such judgment. . . ."[2] Petitioner's brief, p. 2, shows that he has thus tardily attempted to invoke the jurisdiction of this Court "under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. Title 28, sec. 347; 28 U. S. C. A., sec. 347)." Before his petition was filed, and effective September 1, 1948, that section had become Section 1254 of U. S. C. A., Title 28.

Statement of the Case.

A. Preliminary Statement.

An appeal was taken to the Court below under Sections 24 and 25 of the Bankruptcy Act, as amended (11 U. S. C. A., Secs. 47 and 48), by Charles W. Mulcahy as the Trustee of the property of Boston and Providence Railroad Corporation, Debtor (hereinafter called Boston and Providence), now in reorganization proceedings under Section 77 of the Bankruptcy Act in the United States District Court for the District of Massachusetts (Judge Ford), from the Consummation Order and Final Decree (R. 114, *et seq.*)

[2] Section 2101, effective September 1, 1948, is a revision of the Act of February 13, 1925, c. 229, sec. 8 [28 U. S. C. A., sec. 350] limiting the time to "within three months after the entry of such judgment."

of the United States District Court for the District of Connecticut (Judge Hincks) entered September 11, 1947 in proceedings for the reorganization of The New York, New Haven and Hartford Railroad Company (hereinafter called New Haven), Principal Debtor, and Old Colony Railroad Company, Providence, Warren and Bristol Railroad Company and Hartford and Connecticut Western Railroad Company (hereinafter called respectively Old Colony, P. W. & B. and H. & C. W.), Secondary Debtors in the New Haven reorganization proceedings.

The order appealed from provided for the consummation of the bulk of the New Haven plan (including its provisions for acquisition by the New Haven of the properties of the three Secondary Debtors, the issue of securities for such properties and the issue of securities in discharge of the claims of creditors) upon a consummation date (R. 118, fol. 353) later fixed as of 3:00 P. M. on September 18, 1947 (R. 130, fol. 389). However, the order could not provide for the consummation as of that time of the provisions of the New Haven plan for acquisition of the Boston and Providence properties because under the plan those properties were to be acquired in the event of and upon confirmation of the Boston and Providence plan and that plan had not been confirmed. Accordingly the order appealed from reserved jurisdiction (R. 129, fol. 385):

> "(o) To consider and act on any questions respecting claims between the Reorganized Company and the Boston and Providence Railroad Corporation or its Trustee arising out of the provisions of the Plan herein relating to the Boston and

> Providence Railroad Company or arising out of the operation of the lines of the Boston and Providence by the Bankruptcy Trustees or the Reorganized Company."

Boston and Providence is a former lessor of the New Haven system under a lease rejected in the New Haven's bankruptcy. Petitioner concedes (R. 100, fol. 300; R. 105, fol. 313; R. 108, fol. 322) that during the New Haven proceedings the Boston and Providence properties were operated under Section 77(c)(6) and Order No. 217 (R. 58) for the account of Boston and Providence or its Trustee or Trustees. Accordingly Petitioner does not object to Judge Hincks' reservation of jurisdiction to consider and act upon questions respecting the expense of operating Boston and Providence lines for the period prior to the consummation date (*Warren* v. *Palmer,* 310 U. S. 132, 84 L. Ed. 1118; see also *Palmer* v. *Warren,* 108 F. (2d) 164, 2 Cir., 1939), including the New Haven's prior lien claim against Boston and Providence in excess of $12,000,000 for the period June 4, 1936 through December 31, 1946 (R. 206). Instead his appeal is based principally upon the ground that Judge Hincks erred in reserving jurisdiction to consider questions with respect to a future accounting with Boston and Providence for operations subsequent to the consummation date of the New Haven proceedings.

B. The Statute.

Section 77(c)(6) [11 U. S. C. A., Sec. 205(c)(6)], the applicable statute, reads as follows:

> "If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall

elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event *it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission* in accordance with the provisions of Section 1 of Title 49."[3]

No order has been entered by the Commission authorizing any abandonment of the Boston and Providence lines under Section 1 of Title 49, *supra.*

C. Questions Presented.

The questions that Petitioner states he is presenting (Petition, pp. 2, 3) cannot be presented in the present case because the record does not support his express assumptions of fact that underlie such questions. No new company emerged after the consummation order to take over the operation of the New Haven system for the first time as Petitioner suggests. Instead the same New Haven Company that had formerly operated that system resumed its operation when the New Haven Trustees were discharged by the order. That order did not terminate the entire New Haven bankruptcy proceedings and did not provide for the consummation of the entire New Haven plan. In-

[3] Sections 5(2) and 1(18) of the Interstate Commerce Act [49 U. S. C. A. Secs. 5(2) and 1(18)], deemed inapplicable by Respondent and applicable by Petitioner, are printed in the Appendix hereto.

All emphasis herein is supplied unless otherwise indicated.

stead, as the Court below found from the record, "the [Petitioner's] assumption that the [New Haven] reorganization proceedings have been terminated with respect to the lines of the Boston and Providence [by the order appealed from] is contrary to the fact" (R. 214) and the order "did not provide for consummation of the [New Haven plan] provisions relating to acquisition of the Boston and Providence properties" (R. 211) because "that portion of the plan" was not "ripe for affirmative action by the Connecticut court" (R. 215) when the order was entered terminating the bulk of the New Haven proceedings and providing "for consummation of the major part of the New Haven plan" (R. 211). On this record Petitioner's questions should be rephrased as follows:[4]

Where all features of the plan of reorganization for the New Haven and Secondary Debtors were ripe for consummation, except the Boston and Providence features of that plan, and where the District Court had custodial jurisdiction of and admittedly was continuing to operate the lines of the Boston and Providence under Section 77(c)(6) of the Bankruptcy Act for the account of that former lessor (*Warren* v. *Palmer, supra,* 310 U. S. 132), could the District Court, in its order providing for consummation of the bulk of the New Haven plan

(1) authorize the New Haven Trustees to cease operation of the New Haven system, including the Boston and Providence lines, and provide for the return of that system to the New Haven

[4] It will be unnecessary for this Court to determine whether these questions warrant the granting of the writ if this Court dismisses the petition for want of jurisdiction (see Point I, *infra*).

Company, which had previously operated it, (a) without the entry of an abandonment order by the Interstate Commerce Commission under Section 1(18) of the Interstate Commerce Act to provide for the purely formal transfer of Boston and Providence operation back to the New Haven, and (b) without an order by the Interstate Commerce Commission under Section 5(2) of that Act authorizing such operation and approving the terms and conditions thereof; and

(2) reserve and continue the custodial jurisdiction that the District Court already had to continue operation of the Boston and Providence lines for the account of such lines under Section 77(c)(6) with incidental jurisdiction to state the account and charge the deficit as a prior lien against Boston and Providence?

These questions may be boiled down to the simple one whether or not Section 77(c)(6) continued exclusively to govern operation of the Boston and Providence lines under what the Court below characterized as "the peculiar circumstances and practical difficulties inherent in a situation where the entire plan could not be put into operation at one time because acquisition of the Boston and Providence properties was dependent upon action of the bankruptcy court in Massachusetts which had not yet occurred" (R. 215). A majority of the Court below answered all questions in the affirmative in a lucid opinion which stated at the outset (R. 210) that "For an understanding of the appeal a brief statement is required of the relations which have existed between these two railroads

before and during the New Haven proceedings."[5] These relations are complicated. The basic reason that Petitioner gives for granting the writ of certiorari is that the decision below was wrong.[6] We think that decision was right, but in order to support our view we have to argue the merits. The following "Statement of Facts" is offered in order that this Court may have the same knowledge of the record and of the complicated relations between the two companies that the Court of Appeals had when it made its decision.

D. Statement of Facts.

(1) *The Boston and Providence and the Old Colony leases.*

In 1888 the Boston and Providence leased its railroad and property of every description to Old Colony for a term of 99 years; and in 1893 Old Colony leased its railroad and property of every description, including its leasehold interest in Boston and Providence property, to the New Haven for a term of 99 years (*Palmer* v. *Warren, supra,* 108 F. (2d) 164, 165).

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[5] Judge Frank, however, thought that Judge Ford alone, and not Judge Hincks, had authority to state the account and charge the deficit subsequent to the consummation order despite the fact that the New Haven was properly continuing to operate the Boston and Providence under Sec. 77(c)(6). His opinion gives no evidence that he considered *Warren* v. *Palmer, supra,* 310 U. S. 132. See Point II B, *infra.*

[6] He adds that questions of federal law of major importance to the efficient administration of the Interstate Commerce Act and the Bankruptcy Act are involved. These are peculiarly reorganization questions and necessarily their importance has diminished with the completion of most of the major railroad reorganizations in this country. Moreover, and this is significant, the petition does not state that any pending reorganization proceedings involve such questions. We looked for one that did when we wrote our brief in the Court below, but we were unable to find one.

(2) *The commencement of the New Haven reorganization proceedings.*

On October 23, 1935, and in the United States District Court for the District of Connecticut, the New Haven filed its petition for reorganization under Section 77 and on the same day that Court entered its order approving the petition as properly filed (R. 5, fol. 15). By this order the New Haven as debtor under Court supervision was given the usual broad powers to manage and operate its property and transact its business. It continued to operate the New Haven system including its leased lines under the order, but was authorized to disaffirm its contracts or leases,—any performance of them not to be evidence of an adoption (R. 9, fol. 26). By order entered on November 8, 1935, the Court appointed three Trustees of the New Haven's property (R. 13). Upon ratification of their appointment by the Commission, the order gave them title to the New Haven's property, the rights and duties granted to or imposed upon the New Haven by Order No. 1 and the power, right and duty, subject to control of the Court and jurisdiction of the Commission under the Interstate Commerce Act, to operate the New Haven's property (R. 14).

(3) *Facts with relation to Section 77(c)(6).*

On November 30, 1935, about six weeks after the New Haven filed its petition for reorganization, the Connecticut District Court entered its Order No. 17 which provided that in case any leases to the New Haven were eventually rejected "the operation of the leased properties shall have been and said payments [under leases] shall be deemed to have been made for the account of the lessors, and such payments shall be

recovered, set-off, or made and charged, on the earnings and/or properties of the lessors prior to any mortgage or other lien" (R. 18, fol. 54; *Palmer* v. *Palmer,* 104 F. (2d) 161, 163, 2 Cir., 1939), thus effectuating the policy of Section 77(c)(6) that if a "lease of a line of railroad is rejected" and if the lessee has to continue to operate it, such operation shall be continued "on or for the account of the lessor until the abandonment of such line is authorized by the Commission". On June 2, 1936, the Old Colony lease was rejected because its lines had been operated "at a heavy deficit" (*Palmer* v. *Palmer, supra,* p. 162), and one day later it petitioned for reorganization in the New Haven proceedings. Shortly thereafter the Judge passed Order No. 75 (R. 23, *et seq.*) which contained provisions similar to those in Order No. 17, but having relation to lessors of Old Colony, of which Boston and Providence was one (*Palmer* v. *Warren, supra,* 108 F. (2d) 164, 167, 168; R. 30; see also pp. 18, 19). In the interest of continued operation of the New Haven system the order appointed the New Haven Trustees as Trustees also of the property of Old Colony (R. 23; R. 25).

On the basis of a segregation formula developed by the New Haven Trustees' staff, it was evident that the operation under the Boston and Providence lease had become unduly burdensome and the matter of the rejection of that lease was brought to a head by Petition for Order No. 217 filed by Bankers Trust Company, Trustee under the New Haven's First and Refunding Mortgage. That petition pointed to the formula (*Palmer* v. *Palmer, supra,* 104 F. (2d) 161, 165) and asked the Court to stop payment of the rental upon the lease (*Palmer* v. *Warren, supra,* 108

F. (2d) 164, 168; R. 43, fol. 129). On this petition the Court, on October 29, 1937, found that it was necessary to make some segregation of "earnings and expenses as between and to the divisions and parts of the railroad system under the administration of this Court in this proceeding which are separately subject to the liens of the various mortgages or are or were separately subject to lease" (*Palmer* v. *Palmer, supra,* 104 F. (2d) 161, 165). For this reason (*id.*) it ordered that the formula should be sent to the Commission for "its recommendation as to the method or formula by which the segregation and allocation" should be made pursuant to Section 77(c)(10) (*Palmer* v. *Palmer, supra,* p. 165). After hearing, the Commission on April 15, 1938, reported back to the Court that "the Trustees' method of segregation and allocation of the debtor's revenues and expenses between its various mortgaged and leased lines is as fair and reasonable as the circumstances will permit" (*Palmer* v. *Palmer, supra,* p. 165). This report was confirmed by an order of the District Court which was entered "without opposition" (R. 44, fol. 132; R. 54), and no one appealed therefrom (*Palmer* v. *Palmer, supra,* p. 165).

In the meantime, the New Haven Trustees had filed their first Report of Administration (R. 32, *et seq.*), based upon the formula, in which they sought the charge against Old Colony property for the deficits incurred and payments made in operating that property and its leased lines, including the Boston and Providence property, for Old Colony's account under Section 77(c)(6), Order No. 17 and Orders Nos. 74 and 75 (R. 32, *et seq.*; *Palmer* v. *Warren, supra,* 108 F. (2d) 164, 168). After the formula had been approved, as aforesaid, hearings were held on this Re-

port of Administration, and on July 18, 1938, the Court entered its order on the Report (Order No. 300, R. 56-57), fixing the charge against Old Colony at $11,789,000, made up of $5,775,000 against Old Colony, $5,461,000 against Boston and Providence and $552,000 against P. W. & B. The order declared that the deficits against Old Colony and Boston and Providence constituted a prior lien and charge on the earnings and property of Old Colony for the period from the commencement of the New Haven reorganization proceedings (October 23, 1935) to December 31, 1937. The next day (July 19, 1938) the Court entered its Order No. 217 (R. 58) directing the Old Colony Trustees to reject the Boston and Providence lease and directing the continued operation of its property for its account under Section 77(c)(6) (R. 60, fol. 179). The lease was rejected immediately (R. 67, fol. 201).

On July 29, 1938, the New Haven Trustees filed their Petition for Order No. 301 in the District Court which sought a similar accounting with and lien against Boston and Providence property for that portion of the Boston and Providence deficits and payments charged against Old Colony by Order No. 300 for the period between the commencement of the Old Colony reorganization proceedings (June 4, 1936) and December 31, 1937 (R. 64, *et seq.*). On January 16, 1939, Judge Hincks decided that he had jurisdiction to determine the amount of the deficit and to charge it against Boston and Providence property as a prior lien (*Palmer* v. *Warren, supra,* 108 F. (2d) 164, 165). On April 20, 1939, by Order No. 301 (R. 74-75), he liquidated its amount upon principles of *res adjudicata* at the Boston and Providence proportion covered by Order No. 300 for the period

since the institution of the Old Colony proceedings and he granted a prior lien therefor (*Palmer* v. *Warren, supra,* pp. 165, 168, 169). The Court of Appeals affirmed the order as to jurisdiction, but reversed the order on the merits (No. 301), saying that though the Boston and Providence Trustees could not procure any change in the Segregation Formula itself, they could nevertheless oppose the application of that formula to the administration accounting as freely as if Order No. 300 had not been entered.[7] This, in effect, required a new trial of the administration accounting against Boston and Providence under Section 77(c)(6); but during that new trial the Boston and Providence expert collapsed (R. 82, fol. 245) on the stand in the midst of his cross examination by the New Haven Trustees and several months later the Judge was told that the witness was still unable to resume the stand (Opinion of Judge Hincks on the plan of reorganization, December 8, 1941, not officially reported).

The New Haven plan of reorganization has always provided that the reorganized company should acquire the Boston and Providence properties as promptly as possible in the event of and upon confirmation of the Boston and Providence plan; that the purchase price should be payable in specified securities; and that the purchase should include cancellation of the administration claim of the New Haven or its Trustees against the Boston and Providence and cancellation of the Boston and Providence claim for breach of lease (R. 94-96). The Boston and Providence plan has always contained similar provisions (R. 89, 90, 92). Thus the administration claim was an important item in passing upon the merits of both plans; and

[7] This Court affirmed the judgment on the jurisdictional issue. *Warren* v. *Palmer, supra,* 310 U. S. 132.

because of the collapse of the Boston and Providence expert, the amount of the administration charge to January 1, 1940 was stipulated (R. 83, fol. 249) between the respective Trustees at $7,000,000 with the approval of both Courts (R. 85, 87),—the administration claim for that period being $7,577,319.95 (R. 206). At the same time the breach of lease claim was also stipulated (R. 83, fol. 249). The purpose of the stipulation is to permit the evaluation of said claims in connection with "pending plans, and any future modifications thereof not affecting the provisions for the cancellation of said two sets of claims" (R. 83, fol. 248). The Commission has made modifications in the New Haven and Boston and Providence plans, both before and after the stipulation was executed, but it has never modified its basic proposal in both plans that the Boston and Providence properties are to be acquired by the New Haven and that the two sets of claims are to be cancelled upon such acquisition.[8] Accordingly the stipulation has made it unnecessary to procure any final adjudication of the administration claims (R. 205, fol. 613) shown in this record at $12,446,512.62 for the period June 4, 1936 through December 31, 1946 (R. 206), and such claims have been permitted to lie dormant in the expectation that acquisition of the Boston and Providence properties through the respective plans or modifications thereof will avoid any need for further litigation of the claims under Section 77(c)(6).

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[8] The original New Haven plan, proposed by the Commission (239 I. C. C. 7), was modified twice before the stipulation was executed (244 I. C. C. 239; 244 I. C. C. 521) and three times thereafter (254 I. C. C. 63; 254 I. C. C. 405; 257 I. C. C. 9). It was later reaffirmed (261 I. C. C. 195). The original Boston and Providence plan, proposed by the Commission (239 I C. C. 465), was modified once before the stipulation was executed (244 I. C. C. 341) and twice thereafter (254 I. C. C. 126; 254 I. C. C. 463).

On this record there is no reason to suppose that the Commission will change its mind with respect to the Boston and Providence acquisition on cancellation of the claims therein if it proposes a modified plan for that Company as a result of Judge Ford's recent disapproval of the pending plan; and in the meantime the properties of the lessor will doubtless continue to be operated in the public interest just as they have been throughout the period during which changes have been made in the details of both plans without departing from the Commission's basic concepts.

(4) *The action of the Commission and Court in putting into effect the bulk of the New Haven Plan on September 18, 1947 and reserving the Boston and Providence portion of the proceedings for later appropriate action.*

After the Court of Appeals' affirmance of Judge Hincks' order confirming the plan of reorganization of the New Haven, H. & C. W., P. W. & B. and Old Colony (*Old Colony Bondholders, et al.* v. *N. Y., N. H. & H. R. R. Co.*, 161 F. (2d) 413, 2 Cir., 1947), the matter of consummating that plan came on for hearing before Judge Hincks on September 11, 1947 (R. 108, fol. 322), and on the same day he entered the consummation order and final decree (R. 114). The plan thus consummated was that embodied in the Commission's Fifth Supplemental Report and Order (257 I. C. C. 9) and it provided that the New Haven should acquire outright and pay for the properties of H. & C. W., P. W. & B. and Old Colony (*id.*, 33, 34) which were all former leased lines whose properties had been operated under Section 77(c)(6) for their account following the rejection of their leases and the filing of their petitions for reorganization in connec-

tion with or as a part of the plan of reorganization of the New Haven as permitted by Section 77(a),—the New Haven owning a majority of their stock. Accordingly the order did provide for the acquisition of such properties as of a consummation date (R. 118, fol. 353; R. 120, fol. 359) by deed which was executed (R. 173) after the Commission had given its approval (R. 166). However, the Boston and Providence was at that time, and still is, in reorganization proceedings in the District Court in Massachusetts following the rejection of its lease. Indeed, as the Court below has noted, that Company was not even eligible for reorganization in the New Haven proceedings inasmuch as neither the New Haven nor the Old Colony owned a majority of its shares (*Palmer* v. *Warren, supra,* 108 F. (2d) 164, 165). Accordingly the status of the Boston and Providence plan and of the Boston and Providence reorganization proceedings and the New Haven plan provision for acquisition of Boston and Providence properties in the event of and upon confirmation of the latter's plan all prevented the Boston and Providence properties from being acquired by the New Haven through the consummation order at the same time that the properties of Secondary Debtors in the New Haven proceedings were acquired. For this reason the Commission denied without prejudice that part of the application of the Reorganization Committee which sought authority for the acquisition of Boston and Providence properties and authority to issue the necessary securities therefor (R. 143, fol. 427), though it granted the authority sought with respect to the Secondary Debtors (R. 167, fol. 500); and the District Court made the reservation in the consummation order that gave rise to Petitioner's appeal from that order.

After the consummation order was entered, and on November 10, 1947, the Commission denied Petitioner's application under Section 5(2) of the Interstate Commerce Act which asked the Commission to fix the terms and conditions under which his property should be operated by the New Haven or such other carrier (not named) as the Commission might designate (R. 184-186). The denial was "without prejudice" because the Commission thought that the application was presented prematurely in the light of the Court's reservation of jurisdiction (R. 186, fol. 557). Instead of seeking judicial review of the Commission's denial of his application, Petitioner filed a new one on March 24. With it he also filed an application for a certificate under Section 1(18)-(20) of the Interstate Commerce Act "that the present or future public convenience and necessity permit of the abandonment of operation of the lines and property of applicant, *in the absence of a determination by this Commission of the terms and conditions under which the same shall be operated,* including provision for the payment to applicant of such amounts as the Commission may determine to be just and reasonable compensation for the use thereof, as prayed for in the application filed . . . simultaneously. . . ." Thus the abandonment application does not say that operation of the Boston and Providence property should be abandoned in the public interest. Instead it says "that operation by the reorganized New Haven of the properties of applicant, for applicant's account, if the results of such operation are determined under the method and formula for the segregation and allocation of earnings and expenses heretofore recommended by the Commission" would not only fail to give Petitioner rent for

his property but would result in further ruinous and confiscatory charges against that property which would deprive him of his property without due process of law.

ARGUMENT.

POINT I.

The petition should be dismissed for want of jurisdiction inasmuch as it was not filed within ninety days after the judgment of the Court of Appeals as required by the Act of June 25, 1948, 28 U. S. C. A., Sec. 2101(c).

The judgment of the Court of Appeals was entered on June 29, 1948 (R. 220-221). Four days earlier (June 25, 1948) the President approved the new Act of Congress to revise Title 28 of the United States Code entitled "Judicial Code and Judiciary", which revision, upon its delayed effective date (September 1, 1948), required the pending petition to be filed "within ninety days after the entry" of the "judgment" of the Court of Appeals[9] instead of "within

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[9] Sec. 2101(c) is as follows:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree unless, upon application for writ of certiorari, for good cause, the Supreme Court or a justice thereof allows an additional time not exceeding sixty days."

It is settled that this Court will not extend the time for filing a petition unless application for such an extension is made prior to the expiration of the statutory period (*Cresswell ex rel. DiPierro* v. *Tillinghast*, 286 U. S. 560, 76 L. ed. 1293; see *Cherami* v. *Cantrelle*, 287 U. S. 568, 77 L. ed. 500).

three months after the entry of such judgment" as required by the Act of February 13, 1925, c. 229, Sec. 8, 28 U. S. C. A., former Sec. 350. The petition was filed on September 28, 1948, exactly ninety-one days after the entry of the judgment below. It was thus filed on time under the law in effect when the judgment was entered, but it was one day late under the amendment to that law, effective September 1, 1948. Late filing is a jurisdictional defect (*Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, 417, 418, 67 L. ed. 719, 727; *Salmon* v. *U. S.*, 289 U. S. 732, 77 L. ed. 1480), and this Court is without authority to grant the petition if Section 2101, *supra*, governs the time for filing. We urge that it does because the revision of Title 28 contains no saving clause applicable to pending cases and the codification itself indicates that Congress intended it to have retrospective application.

Cases in the State Courts are in hopeless confusion on the question whether or not a statutory amendment, effective after the lower Court's judgment and shortening the time for review, is applicable to limit such time in the absence of a discoverable legislative intent one way or the other.[10] However, this Court at an early date settled the rule in our favor (*Baltimore & Potomac R. Co.* v. *Grant*, 98 U. S. 398, 25 L. ed. 231).

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[10] In *Coker, et al.* v. *Fountain, et al.*, 200 Ala. 95, 75 So. 741, the appellant, like petitioner here, had practically one month after the new Act became effective within which to file his appeal on time under that Act, but he failed to do so. The appeal was dismissed, the new Act having no saving clause. In *Smith* v. *Packard*, 12 Wis. 371, the comparable period was nine months and the result was the same. See also *Tenn. River Navigation Co.* v. *Grantland*, 199 Ala. 674, 75 So. 283; *Lafferty* v. *Shinn*, 38 Ohio St. 46, 48; *Bowen* v. *Wilson*, 93 Kan. 351, 144 P. 251. The weight of authority in the State Courts is contrary to these cases.

In that case a writ of error was sued out December 6, 1875 in a case involving a judgment for $2,250,—the applicable statute at that time giving this Court jurisdiction where the amount in controversy was in excess of $1,000. On February 25, 1879, while the writ of error was pending in this Court, the earlier statute was repealed and a new one passed raising the jurisdictional amount to an amount exceeding $2,500 without any statement as to pending proceedings. The Court said that "if it had been the intention to confine the operation of what was done to *judgments thereafter rendered or to cases not pending,* it would have been easy to have said so" and it concluded that in the absence of a saving clause it must presume that Congress meant what it said.[11] The force of this case lies in the fact that statutes dealing with amount in controversy and with time for filing appeals or writs of certiorari are both jurisdictional (see also *National Exchange Bank* v. *Peters,* 144 U. S. 570, 36 L. ed. 545). Thus the case is applicable here. Indeed it is applicable *a fortiori* to the purely discretionary writ of certiorari in which no one has a vested right and which may be granted or denied at the pleasure of this Court.

Furthermore, all cases agree that such a statute as the one here involved will be applied to pending cases if that was the intention of the legislature. Such an intention is so plain here as to convince even the most ardent follower of the so-called presumption against retroactivity which is applied by some State Courts in the case of modification of appellate

[11] The absence of such a clause is significant in cases where the substantive law is changed pending appeal (*Gulf C. & S. F. R. Co.* v. *Dennis,* 224 U. S. 503, 506, 56 L. ed. 860, 867). These cases are at least analogous to the present one that involves procedure.

statutes. New Section 2101 of the Judicial Code was passed on June 16 before the Court of Appeals' judgment was entered and it was approved by the President on June 25, also before that judgment was entered. Thus it was "on the books" before Petitioner even saw the opinion of the Court of Appeals (R. 209) or its judgment (R. 220); and the Congressional decision to delay the effective date of the entire revision to September 1, 1948, suggests on its face an intention, supported by legislative history, "to provide a reasonable time for the bench and bar to familiarize themselves with the provisions of the act" (Senate Report No. 1559 to accompany H. R. 3214; see pamphlet copy of new Title 28 U. S. Code published by the West Publishing Company and Edward Thompson Company, p. 1689). This in turn suggests that after the expiration of such reasonable time, viz. on September 1, 1948, the bench and bar, presumably being familiar with the new provisions, were intended to apply such provisions to all pending matters. After all the change in the law was a very minor one, the purpose of which was to substitute a constant ("ninety days") for a calendar variable ("three months") of approximately the same dimensions; and the nature of the change is indicative, without more, of an intention to apply it to the present petition.[12]

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[12] See the pamphlet copy of new Title 28, *supra*, "Reviser's Notes", p. 1899, in which it is stated that the change "substitutes, as more specific, the words 'ninety days' for the words 'three months' contained in Section 350 of title 28 U. S. C., 1940 ed."

The relative insignificance of the change will be disclosed by looking at the calendar. In any year other than a leap year the old and the new periods would correspond exactly for petitions for writs of certiorari from judgments rendered on or between November 30 and February 27. In a leap year the new law

[Footnote continued on following page.]

But this is not the only indication that Congress intended to apply its new laws to matters pending on September 1: it placed that intention beyond question by repealing Judicial Code Sec. 229 (Act of March 3, 1911, c. 231, Sec. 299; 36 Stat. 1169; former 28 U. S. C. A., Sec. 442) without providing a comparable substitute applicable to the new legislation.[13] Thus the present case goes beyond mere absence of a saving clause (*Baltimore & Potomac R. Co.* v. *Grant, supra,* 98 U. S. 398), for here there was deliberate destruction of an existing though limited saving clause and a failure to provide a new one. Such clauses are customary where application to pending cases is intended to be avoided or limited. See, for example, *Vaughan* v. *American Insurance Company of Newark, New Jersey,* 15 F. (2d) 526, 5 Cir., 1926, involving a saving clause with respect to the Act of February 13, 1925 (43 Stat. 936, 942, Sec. 14), Sec. 8 of which included former Title 28 U. S. C. A., Secs. 350 [now Sec. 2101 (c)—the very section here involved] and 347 [now Sec. 1254], the latter being cited in the petition, p. 2.

Nor have we been able to discern even a "fireside equity" that would militate against the application of Section 2101(c) in the present case. This Court has said that "In these days of rapid communication, the

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[Footnote continued from preceding page.]

would give one day less than the old for the foregoing period; and in most other instances the new law would give two days less than the old. Thus the decrease varies between zero and two days. As a purely practical matter, such a minor change will not be significant except to those persons (and there are always a few of them) who file their petitions at the last minute on the theory that familiar statutory time limitations are immutable. All others are amply protected by the delayed effective date of the new law.

[13] The repeal of the foregoing section is to be found under the so-called "Amendments of Other Titles", Sec. 39, pp. 1648, 1656, in the pamphlet copy of new Title 28, *supra.*

statutory allowance of three months is more than ample for an unsuccessful litigant to determine whether to seek further review" (*Commissioner of Internal Revenue* v. *Bedford,* 325 U. S. 283, 288, 89 L. ed. 1611, 1616). As noted, the decrease in time for filing the present petition under the new law was only two days. That law was well publicized, it was approved before the Court of Appeals' judgment and became a law at the time of its approval. A mere reading of it would have shown at the same time a change in existing law and the desirability of filing the petition two days before the earlier deadline.

We urge that the foregoing Point I is determinative in the present case. If this Court agrees, it will be unnecessary for it to read the rest of this brief in opposition.

POINT II.

The operation of the lines of railroad of the Boston and Providence by the New Haven Trustees prior to the consummation date and by the New Haven subsequent thereto has been and such operation still is exclusively governed by Section 77(c)(6) of the Bankruptcy Act.

A. The portion of the New Haven bankruptcy proceedings that relates to the Boston and Providence has not terminated as Petitioner claims, and therefore Section 77(c)(6) is just as applicable now as it was prior to the consummation date.

Petitioner has conceded in the District Court (R. 100-102; 105, fol. 315; 108, fol. 323; 111, fol. 333; 113, fol. 338), in the Court below (R. 214) and here (Petition, p. 19) that prior to the consummation date oper-

ation of the Boston and Providence by the New Haven was governed by Section 77(c)(6). He "contends", however—Petition, p. 21:

> ". . . that the force of that section is exhausted upon the *termination* of the reorganization proceedings, and . . . that exclusive jurisdiction with respect to operations thereafter is with the Commission and not the Court."

According to Petitioner the real question presented is whether the arrangement described by Section 77(c)(6) "survives the *termination* of the reorganization proceedings" (*ibid.*). It is at once apparent from these and other statements (Petition, pp. 9, 10, 22) that Petitioner's whole theory of the case is bottomed upon the assumption that the New Haven proceedings terminated in their entirety on September 18, 1947. That assumption, however, is contrary to fact. The portion of the New Haven bankruptcy proceedings that involved the Boston and Providence has not been closed. Instead it has been kept very much alive, both by the Commission and the Court, for reasons that are clear from the present record (opinion of the Court of Appeals, R. 215).

The difficulties inherent in a situation in which the lessee is in reorganization in one District Court and the lessor is in reorganization in another were recognized by the Commission. It stated that "it has not been found practicable for the plan . . . for the Boston and Providence . . . to move concurrently with the plan herein" and added "The plan herein has been formulated with a view to overcoming these difficulties". It stated further that "The confirmed plan for the reorganization of the [New Haven]

debtors is not contingent upon the acquisition of the properties of the Boston and Providence" [Supplemental Report of Interstate Commerce Commission authorizing the acquisition of properties, issue of securities and assumption of obligations and liabilities by the New Haven pursuant to its plan of reorganization (R. 136, fol. 408; R. 137, fol. 411)]. With respect to the Boston and Providence plan the Commission stated (R. 143, fol. 427):

> "That plan as yet has not been approved or confirmed by the court having jurisdiction over the reorganization of that corporation. Accordingly we do not deem it appropriate that we authorize the acquisition of its properties or the issue of securities in payment therefor *at this time* and that part of this application which so requests will be denied, without prejudice to an appropriate renewal of such request in the event of, and upon confirmation of, that plan of reorganization."

This was in substance a reservation of jurisdiction by the Commission of questions with respect to the Boston and Providence acquisition in the New Haven proceedings.

The Court also knew that not all of the New Haven plan could be consummated on September 18, 1947 and that complete termination of the bankruptcy proceedings on that day would have to be prevented. The action that it took in the consummation order was both appropriate and necessary to these ends. By Subdivision XI-3 of the order the Court "terminated . . . all jurisdiction . . . in or by virtue of these proceedings" as of the consummation date "*except as provided*" in Subdivision XI-2 (R. 129, fol. 387); and

in Subdivision XI-2 (R. 127, *et seq.*) the Court made sixteen express reservations of jurisdiction with respect to unfinished business in the New Haven proceedings, one of which was the reservation of jurisdiction to consider and act on any questions respecting claims between the New Haven and the Boston and Providence or its Trustee arising out of the plan provisions relating to Boston and Providence or arising out of the operation of its lines by the New Haven Trustees or the New Haven Company [Reservation (o), R. 129]. Also in the same order the Court relieved the New Haven from and after the consummation date from any Court "custody or control . . . *except only to the extent herein otherwise provided*" (R. 123, fol. 367),—an exception that is referable only to the various reservations of jurisdiction, including that with respect to Boston and Providence questions. Petitioner is in error when he says that the District Court "nowhere reserved . . . custody of the Boston and Providence property" (Petition, p. 23; see also pp. 2, 12, 13).

Thus by the consummation order the Court carved out of the totality of the proceedings for termination so much thereof as was ripe for consummation; and it retained and kept very much alive the remaining portion of the proceedings, including that with relation to Boston and Providence. Essentially, therefore, it took affirmative action with respect to the acquisition of the properties of the three other lessors and the issue of new securities because the time was ripe for such action. Out of the necessities of the case, however, acquisition of the Boston and Providence had to be postponed until some future time, and the steps that the Court took with respect to the Boston and Providence were essentially negative in the sense that

the status quo of that aspect of the proceedings was preserved by reservation until the time should become ripe for affirmative action. Therefore the New Haven bankruptcy proceedings as to its Boston and Providence features did not terminate as Petitioner suggests. It follows that Section 77(c)(6) still governs Boston and Providence operations as fully as it did when *Warren* v. *Palmer* was decided,—a conclusion that would be inevitable, in view of the reservation, even if this Court were willing to restrict the temporal applicability of Section 77(c)(6), as Petitioner does, to the pendency of the lessee's bankruptcy proceedings.

As applied to the Boston and Providence situation, the action of the District Court in preserving the status quo was fully in accord with *Continental Illinois Bank and Trust Co.* v. *Rock Island and Pacific Ry. Co.*, 294 U. S. 648 [1935]; *Smith* v. *Hoboken R. W. and S. C. Co.*, 328 U. S. 123 [1945]; and *Thompson* v. *Texas Mexican R. Co.*, 328 U. S. 134 [1945]; which hold that the status quo must be preserved wherever that is necessary to enable the Commission to formulate and provide for the carrying out of a satisfactory plan of reorganization. Indeed the Boston and Providence plan has now been disapproved and has been sent back to the Commission for further action,—a development that amply justifies the Court's preservation of the status quo by reservation of that aspect of the New Haven proceedings.

Despite this background Petitioner argues that the Court below was wrong in holding that the New Haven plan provisions for acquisition of the Boston and Providence could be modified by cooperative action between the Commission and the District Court (Peti-

tion, pp. 13, 14). A sufficient answer to this argument is that Petitioner failed to include the holding in his "Specification of Errors to be Urged" and omitted to mention it in his "Questions Presented". But apart from these procedural obstacles, the proviso in reservation "q" (R. 129, fol. 386) was manifestly directed at the plan provisions that the Court was putting into effect and not those that had to be deferred pending action by the Commission and Judge Ford in the Boston and Providence proceedings.

B. The reservation, in continuing Boston and Providence operations under Section 77(c)(6), constituted neither an invasion of Judge Ford's exclusive jurisdiction to reorganize Boston and Providence nor an unjustified retention of control of either the New Haven or Boston and Providence.

During the years 1939-1940, the District Court, the Court of Appeals and this Court all agreed that the District Court had jurisdiction in the New Haven proceedings to ascertain and to charge the deficit incurred by the New Haven Trustees in operating Boston and Providence properties under Section 77(c)(6) as a prior lien against Boston and Providence assets (*In re N. Y. N. H. & H. R. R. Co.*, 26 F. Supp. 18; *Palmer* v. *Warren, supra,* 108 F. (2d) 164; *Warren* v. *Palmer, supra,* 310 U. S. 132). At the outset this Court said that:

> "The controversy [between the New Haven and Boston and Providence Trustees as to jurisdiction] has substance because of the contention of the trustees for the Boston and Providence that, as the court charged with the reorganization of that road (the Massachusetts District Court) has

> 'exclusive jurisdiction' under § 77(a) 'of the debtor and its property wherever located,' the Connecticut court cannot consider the claims of the New Haven and Old Colony trustees for operating deficits or impose a lien on the Boston and Providence property to secure them" (p. 137).

The precise holding on this central issue was that Judge Hincks' jurisdiction to impose the lien and charge under Section 77(c)(6) in no way impaired Judge Ford's exclusive jurisdiction under Section 77(a) to accomplish the Boston and Providence reorganization. This Court's reasoning was that:

> "The Massachusetts court is left with jurisdiction to accomplish this [the Boston and Providence reorganization], but is bound to recognize the priority of the lien declared by the Connecticut court. By § 77(c)(6) the Connecticut court was given jurisdiction *so long as it continued to operate the road* to grant a lien for operating expenses prior to any existing claims against the road" (pp. 140, 141).

Judge Frank agreed with the majority of the Court below that Section 77(c)(6) continued to govern the New Haven's operation of Boston and Providence lines after the consummation date (R. 216); but he thought, nevertheless, that Judge Hincks erred in reserving jurisdiction because:

> "The 'reorganization' with respect to the lines of the B & P has never been within that court's jurisdiction. It has been, and is now, in the exclusive jurisdiction of the federal district court for the District of Massachusetts. The court below therefore had no authority to deal with the

> reorganization of the B & P or with any sale or other disposition of its properties" (R. 217; see also R. 219).

His holding and that of this Court in the 1940 litigation are thus completely irreconcilable.[14]

We have no means of knowing whether or not Judge Frank overlooked this Court's opinion in *Warren* v. *Palmer* despite its citation in the majority opinion (R. 211, note 2); but his failure to follow that decision may perhaps be explained, if not justified, by his mistake as to a matter of fact in the present record. He believed that the claims in the administration accounting for expenses of operation of the Boston and Providence lines were claims *by* the Boston and Providence *against* the New Haven Trustees, whereas in fact they were claims *by* the New Haven and its Trustees *against* the Boston and Providence and its Trustees.[15] However, we do not see

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[14] He even seized upon language of the majority of the Court of Appeals that the reorganization proceedings before Judge Hincks had not been terminated with respect to the Boston and Providence (R. 217; see also Petition, pp. 10-12) as implying that Judge Hincks had previously had or then had jurisdiction of the Boston and Providence reorganization. This argument does not differ in any respect from the argument of the Boston and Providence Trustees made to this Court in *Warren* v. *Palmer*, *supra*, and rejected by this Court.

[15] He said (R. 216):

> "I think . . . that it was error to 'retain' jurisdiction of claims *of* the B & P *against* the reorganized New Haven arising from its operations of the B & P lines after the discharge of the New Haven Trustees."

This error of fact cannot be characterized as typographical because the Judge made it at five points in his opinion and in five different forms (R. 216 twice, R. 218 three times). Petitioner as Trustee of the Boston and Providence does indeed have a claim against the New Haven, but that claim is an unsecured claim for breach of lease and not a claim for operation of the Boston and Providence properties which was involved in the appeal to the Court below.

what bearing a reversal in the direction of the operating claims could possibly have upon the conclusion that the reservation interfered with Judge Ford's exclusive jurisdiction to reorganize the Boston and Providence under Section 77(a). See, however, the last paragraph, R. 219, where the Judge appears to have seized upon the claims for the operating deficit as one basis for his conclusion that the reservation reached out to control the Boston and Providence,—"another railroad whose reorganization and property-dispositions are not the business of the court below". This language, by implication at least, suggests that the exclusive jurisdiction of Judge Ford over the Boston and Providence reorganization was interfered with by the reservation.

But the error with respect to the direction of the claims did lead Judge Frank to conclude (R. 218) that the "claims by the B & P against the reorganized New Haven, because of its operations of the B & P lines" subsequent to the consummation date were no different from "claims made by shippers or passengers, stemming from the operations of the reorganized New Haven" (*ibid.*) and that, therefore, Judge Hincks would have no jurisdiction after *completion of the reorganization proceedings* to wet nurse the New Haven by retaining jurisdiction of such claims. Both the dissenting opinion (R. 218) and the petition (p. 24) rely at this point upon cases which indicate that in Chapter X and Section 77B proceedings Congress did not intend that a bankruptcy court should have power by reservation of jurisdiction to "wet nurse" the reorganized company (*In re Flatbush-Nevins Street Corporation,* 133 F. (2d) 760, 2 Cir., 1943, and other cases cited). But these cases would not be applicable, even on the assumption of Judge

Frank and Petitioner that the New Haven proceedings had terminated, because these same decisions recognize that jurisdiction may be retained by the reorganization court "to protect its decree, to prevent interference with the execution of the plan and to aid otherwise in its operation" (*Towers Hotel Corporation* v. *Lafayette National Bank,* 148 F. (2d) 145, 148, 2 Cir., 1945).

And the fact that the Boston and Providence portion of the New Haven proceedings was not terminated is alone sufficient to demonstrate the inapplicability of the cases which forbid a reorganization court to act as "wet nurse" to the reorganized company. In the present case the Boston and Providence plan had not matured to a point that would permit Judge Hincks to release care and custody as he did in connection with the other former lessors whose properties were to be acquired forthwith under the New Haven plan. He therefore retained the Boston and Providence features, *in gremio legis* as it were, until their future development should justify their release.

C. Even if, as Petitioner contends, the New Haven proceedings had terminated, Section 77(c)(6) remained in full force and effect and would still govern the operation of the Boston and Providence lines by the New Haven until abandonment is authorized by the Commission.

Section 77(c)(6) is based upon the public interest in continued rail transportation (*Warren* v. *Palmer, supra,* 310 U. S. 132, 140) and with forthright simplicity it furthers that interest by providing that after rejection of a railroad lease in Section 77 proceedings, and if it is impracticable and contrary to the public interest for the "lessor" to operate its line,

> "it shall be the duty of the lessee to continue operation on or for the account of the lessor until

the abandonment of such line is authorized by the Commission" under Section 1 of the Interstate Commerce Act.

The petition says (p. 20) that consideration must be given to the "exact language" of the statute in determining whether or not it now applies to the operation of Boston and Providence lines by the New Haven. We agree wholeheartedly; and we agree, also, that the crucial word "lessee" as employed in the statute sufficiently described the Trustees of the New Haven while they were operating the line (*Warren* v. *Palmer, supra,* p. 139).[16] But we come to a very definite parting of the ways with Petitioner when of necessity he argues that the word "lessee" does not now describe the New Haven because "for all intents and purposes" the New Haven "should be considered a separate and distinct entity", viz. a "new corporation" upon emerging from reorganization (Petition, pp. 21, 7, 13, 10, 20).

The identity of the New Haven before its reorganization proceedings, during those proceedings and now is a cold, hard fact and not a "fortuitous circumstance" (Compare Petition, pp. 20, 21). Indeed it is only by disregarding the realities and viewing the New Haven as something it is not that Petitioner can apply the exact language of Section 77(c)(6) and reach a conclusion that the statute does not apply in terms to the present situation.[17] We submit that the New Haven may be considered a new corporation only for

[16] More precisely the New Haven became sub-lessee of the property of Boston and Providence, but the broader word "lessee" in the statute adequately covers that situation.

[17] Petitioner admits that the present operations of its property "are being conducted by a carrier having the same name as the principal debtor, and, indeed, incorporated under the same charter, with certain amendments . . ." (Petition, p. 20).

the intents and purposes of disregarding the plain meaning of the statute.

Implicit in Petitioner's argument at this point is his belief that as a matter of law the application of Section 77(c)(6) to the operation of his property would be avoided if a new corporation had been formed to operate it with the rest of the New Haven system. Here also we disagree; and we think that the statute would govern even if the Reorganization Committee had decided that a new corporation should be created to succeed the New Haven in present operations. The public interest in continued operation of the Boston and Providence is the same now as it was when the lease was rejected; and we cannot believe that the application of the statute which is based upon that interest would be defeated by creating a new corporation to do precisely what the old one had been doing for the New Haven system. This is especially true where, as here, the guardian of the public interest (the Commission) by giving the election to the Committee in the New Haven plan of reorganization under Section 77, has said in effect that under Section 77(f) it would approve either method of carrying out the plan which, incidentally, was "not contingent" (R. 137, fol. 411) on immediate acquisition of Boston and Providence, and therefore, of necessity, envisaged continued interim operation of that property.

Moreover the term "lessee" as used in Section 77(c)(6) is broadly descriptive in the sense that it identifies an operating carrier by reference to its status prior to rejection of a railroad lease. We have seen that it is descriptive of a lessee's trustees who succeed the lessee in system operation and we think it would be equally descriptive of a new corporation which might succeed the New Haven Trus-

tees in identical operations. In short the term "lessee" in the statute refers to any succeeding operating entity upon which may be placed the duty of operating the property in the public interest, and its true meaning is not to be found in distinctions between legal entities in corporation law. But however this may be it is still true that no new corporation was created in the present case; and we should suppose that there would be no need for deciding whether the statute would govern operations had the facts been different (R. 214).

Furthermore, as previously noted, Petitioner's attempted construction of the statute disregards the decision of this Court in *Warren* v. *Palmer, supra*, 310 U. S. 132, and misinterprets the statement made by the Court (pp. 140, 141) that:

> "By § 77(c)(6) the Connecticut court was given jurisdiction *so long as it continued to operate the road* to grant a lien for operating expenses prior to any existing claims against the road."

That sentence covers the present situation. As noted, the Connecticut Court reserved both custody and jurisdiction; and there has been no change in the situation since the entry of Order No. 217 directing operation of the lines of the Boston and Providence for its account pursuant to Section 77(c)(6). Under the plain language of the statute and under the holding of this Court New Haven operation will continue for the account of the Boston and Providence until abandonment is authorized by the Commission.

Petitioner appears to conceive of Section 77(c)(6) as a device for the enslavement of Boston and Providence, but the difficulty in which he finds himself

is due not to the statute but to the stubborn fact of mounting deficits in the operation of Boston and Providence lines. In providing for operation "for the account of the lessor" the statute adopted the so-called "net earnings" rule in equity receivership cases, the essence of which is that the lessor is entitled to the net earnings of his line if there are any and is liable for deficiencies where there are no net earnings (*Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 F. (2d) 721, 728, 729, 731, 2 Cir., 1912). As applied in the present case the rule is both familiar and fair. Petitioner has repeatedly conceded (R. 101, fol. 301; R. 106, fol. 316; R. 107, fol. 325) that the public interest demands the continued operation of his lines, yet no pretense is made either that the Boston and Providence is itself able to operate them or that a *deus ex machina* will suddenly appear to take over the operation and relieve the New Haven of the burden. If there were net earnings, we are sure that Petitioner would demand them. In fact the operations were conducted at a heavy loss and we have not yet seen any immediate possibility of the New Haven's being relieved of them. But the philosophy underlying the petition is that the New Haven should pay rent for the privilege of paying the operating deficits,—a result that would be inequitable indeed.

Nor in the face of the plain language in the statute—"until the abandonment of such line is authorized by the Commission"—is there any justification for implying as Petitioner does that the statute is operative only during the period of the lessee's bankruptcy or until earlier authorization by the Commission of abandonment of operation (Petition, p. 19). The exact period of time during which a lessee

may be compelled to operate deficit producing property under Section 77(c)(6), in the absence of an abandonment order by the Commission, is of course not in issue in the present case. We make no contention that the statute is intended to operate in perpetuity since we think that in time the Commission will find a solution for the present difficulties. It is sufficient here to point out that nothing in the statute requires or implies that the "permanent arrangement" of which Petitioner speaks (Petition, p. 19) must be made prior to or upon the termination of the lessee's reorganization proceedings. In the present case we believe that the so-called "more permanent arrangement" will come about when the Commission formulates the terms of the Boston and Providence plan providing for the acquisition of its properties by the New Haven with probable cancellation of the administration claim. In the meantime, so long as the New Haven is forced to operate this deficit producing property under Section 77(c)(6), it is fair and reasonable that it have a prior lien as security for repayment of its expenses just as it did *vis-a-vis* Old Colony until it was certain that that property would be acquired.

D. The transfer of operations of the lines of the Boston and Providence from the bankruptcy Trustees to the New Haven Company did not constitute an "abandonment" by the Trustees within the meaning of Section 1(18) of the Interstate Commerce Act.

Petitioner's argument that such transfer did involve an "abandonment" requiring the Commission's approval is subject to the difficulty that it proves too much. If as he claims the Trustees were one "carrier by railroad" and the New Haven was another and

different "carrier by railroad" within Section 1(18), his argument would prove that certificates of public convenience and necessity should have been issued with respect to the New Haven's own property and that of its leased lines when the Trustees were first appointed and took over system operation. Possibly it would also prove that a Section 1(18) order should have been entered when Mr. Sawyer succeeded Mr. Daniels as Trustee. However, it is well known that the Commission does not issue certificates in such cases.

It is equally well known that the Commission never takes any action under Section 1(18) as such when, as here, it enters an order under Section 77(f) providing, among other matters, for the transfer of properties and of operation that are always involved in carrying out any plan of reorganization. This is because of the sentence in Section 77(f) which states that:

> "Upon confirmation of a plan the Commission shall, *without further proceedings,* grant authority for the issue of any securities, assumption of obligations, transfer of any property, sale, consolidation or merger of the debtor's property, or pooling of traffic, to the extent contemplated by the plan and *not inconsistent* with the provisions and purposes of the *Interstate Commerce Act* as now or hereafter amended."

When the application of the New Haven Reorganization Committee came before the Commission under Section 77(f), the Commission expressly pointed out that operation of the Boston and Providence was not going to be abandoned upon entry of the consumma-

tion order (R. 134, 135, fols. 402, 403), and it knew that the New Haven was going to continue such operation. Presumably, also, when the Commission entered its Section 77(f) order it performed its statutory duty and determined there was nothing in its action that was inconsistent with the provisions and purposes of Section 1(18). It knew that it did not have to proceed formally under the Interstate Commerce Act at that time (R. 137, fol. 410; and see R. 160, fols. 478, 479) and that the exercise of its function under Section 77(f) was "primarily ministerial" (R. 136, fol. 406) because it had already considered every aspect of the situation including the public interest upon which Section 1(18) is based.[18] The Commission knew that the Trustees were going to stop operation and that the New Haven was going to resume operation on the consummation date and no formal order under Section 1(18) was required under such circumstances.

Petitioner, however, attempts to support his argument on this point by reference to broad generalities in *Smith* v. *Hoboken R. W. & S. C. Co., supra,* 328 U. S. 123 (Petition, p. 18), though he himself recognizes that it "did not involve the question here presented" (Petition, p. 21). We agree that the *Hoboken* case is suggestive but not controlling. However, we wish to clarify the manner in which it is relevant to the instant situation.

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[18] Throughout the long course of the proceedings the Commission had formulated the plan with a view to bringing about a reorganization in the public interest without breaking up the New Haven system despite difficulties arising out of the fact that the Boston and Providence plan could not move concurrently (R. 136, fol. 408). What the Commission did was to assure continued operation of the Boston and Providence "upon which the public has depended for service" (id.) until someone should be in a position to show that the public interest permitted its abandonment by the New Haven.

By its very terms Section 77(c)(6) may becomes operative when a railroad lease is rejected. In the *Hoboken* case the debtor adopted the lease by order of the Court. Thus the Supreme Court did not even have before it a question whether Section 1(18) or Section 77(c)(6) should govern in a situation such as that in which the New Haven is now involved. Likewise in the *Hoboken* case an active lessor was anxious to regain possession of its property, whereas by its own repeated admissions the Boston and Providence is unable to operate. From these widely dissimilar positions of the respective lessors comes the only factual similarity with respect to Section 1(18) in the Hoboken and New Haven situations,—namely, that in neither is there a present probability of complete abandonment or of abandonment of operation.[19] It is this fact which forces Petitioner to seek an "abandonment" in the purely formal transfer of operations from the Trustees to the New Haven Company.

With these distinctions in mind it is possible to evaluate the true significance of the *Hoboken* case. As stated by the Court the question there presented was whether the lessee or lessor should operate (*Smith* v. *Hoboken R. W. and S. C. Co., supra,* p. 130). The Court then states that the abandonment prohibited by Section 1(18) includes discontinuance of operations by the Trustee, and that a certificate is required where the abandonment is by the lessee or by the lessor. This statement is immediately followed by saying that whether the public interest required operation by the lessee or lessor presented a question for the Commission. The statement upon which Petitioner relies

[19] In *Thompson* v. *Texas Mexican R. Co., supra,* 328 U. S. 134 there was a possibility that a using railroad might abandon the use of tracks of another railroad between two points, but otherwise the above distinctions apply.

(Petition, p. 18) regarding abandonment of operations by a Trustee, unless completely divorced from its context, cannot be taken as authority for the proposition that the transfer of property from bankruptcy Trustees to a reorganized company constitutes an "abandonment" under Section 1(18).

This conclusion is also substantiated by the language which Mr. Justice Douglas used in referring to the action which the Commission had taken in the *Hoboken* case. He wrote (at p. 129):

> "But that case only held that the lessor needed no certificate of public convenience and necessity under Section 1(18) to operate the road, as, if, and when the *lessee or its trustee* ceased operations. It did not present the question whether operations by the *lessee or its trustee* might be abandoned. No application for abandonment of operations by the *lessee or its trustee* was before the Commission. Authority of a lessor to resume operations if the *lessee or its trustee* abandons is one thing; authority of the *lessee or its trustee* is quite different."

It is significant that five times in this one paragraph the phrase "lessee or its trustee" is used in the discussion of abandonment; and in the previous paragraph, in referring to the District Court's order authorizing the lessor to reenter, the phrase used was "to oust the debtor and the trustee." The language makes it clear that the Court was thinking, not in terms of a technical distinction between legal entities of the same operating unit, but in terms of a choice between two carriers, the lessee and the lessor; and the language used follows the train of thought of Mr. Justice Reed's references in *Warren* v. *Palmer*,

supra, 310 U. S. 132, 140, to "those who carry out the operation" and to "those having the materials, men and equipment needed for operation."

No one would seriously question that the public interest in the continuation of railroad service was the dominant factor in the enactment of Section 1(18) and in the enactment of Section 77(c)(6) which provides for continued operation by the lessee in the public interest until abandonment is authorized under Section 1(18). The true significance and relevance of the *Hoboken* case is that the language there used, as in *Warren* v. *Palmer,* shows at the same time a clear appreciation of this public interest and a conscious avoidance of over-technical niceties in the interest of a practical solution. In contrast to this philosophy, Petitioner's argument is a purely technical one without even a suggestion that the public interest required definitive action under Section 1(18) on September 18, 1947 to bless a purely formal change that the Commission had considered when it entered its Section 77(f) order the day before.[20] The real purpose of Petitioner's argument thus stands revealed in his hope that entry of the unnecessary order he suggests would permit him to charge rent for his deficit producing property under Section 5(2) since there would have been an "abandonment" with the Commission's approval. But the Commission does not enter abandonment orders in such cases; and if it did there is no reason to suppose that the order would stop the running of Section 77(c)(6) which is based on a public interest that has not changed. Operation of the Boston and Providence is being continued by the New Haven and the record is barren

[20] The Court below characterized Petitioner's argument at this point as "the extreme of technicality" (R. 214).

of any intimation that anyone else wishes to or could operate it. Petitioner does not even pretend that the public interest is presently involved.

It is accordingly submitted that there has been no "abandonment" within the meaning of Section 1(18) of the Interstate Commerce Act and that the law did not require the Commission to enter any abandonment order when the New Haven resumed operation of its system as contemplated in the plan pending its acquisition of the Boston and Providence properties or some other disposition of that property.

E. Section 5(2) of the Interstate Commerce Act neither is nor should be applicable in the present situation.

Petitioner admits, as he must, that the rule of Section 5(2) of the Interstate Commerce Act is not applicable to the present operation of the Boston and Providence property if Section 77(c)(6) applies to that operation (Petition, pp. 19, 20).[21] He has therefore been forced to argue that the bankruptcy subdivision is no longer applicable (Petition, p. 19, opinion below, R. 214). However, as we have shown in Point II, subdivisions A and C of this brief, Section 77(c)(6) continues exclusively to govern the operation of Boston and Providence lines in the absence of an abandonment,—a result that is not in any way dependent upon the fact that the Boston and Providence is being reorganized. Thus we would be justified in concluding our argument at this point. But the very fact that the Boston and Providence re-

[21] He says that under the rule of *Warren* v. *Palmer*, *supra*, 310 U. S. 132, 138, the bankruptcy sub-section "modifies *pro tanto* the rule of the Interstate Commerce Act [Sec. 5(2)] for operation" (Petition, p. 19) and he adds that where the bankruptcy sub-division applies "Congress has determined the terms and conditions under which the operation shall be conducted, viz., 'for the account of the lessor,' and no one is given any discretion in the matter" (Petition, p. 19).

organization proceedings are pending and uncompleted is in itself a sufficient reason why Section 5(2) proceedings should not be started at the present time.

Whatever else it may be, Section 5(2) of the Interstate Commerce Act is not a statute under which the Boston and Providence could be reorganized. The properties of that Company are subject to a prior lien in the amount of $12,446,512 for operating expenses and payments by the New Haven through 1946 (R. 206, fol. 618), and an estimated $4,683,032 more for the year 1947,[22]—a total of $17,129,544, most of which is for the period prior to the consummation date. Even if Section 77(c)(6) ceased to govern operation after that date, the administration claims against Boston and Providence, and that Company's claim in the amount of $10,000,000 for breach of its lease (R. 83, fol. 249) would have to be taken into account in reaching any "more permanent arrangement" for the operation of its properties. And these claims are so large and so important to the financial structure of Boston and Providence that they can be handled only through an over-all plan of reorganization and not piecemeal, as it were, under Section 5(2).

Inasmuch as Judge Ford has recently disapproved the Boston and Providence plan (R. 216), the Commission will doubtless reconsider that matter; and when it does so it may either adhere to the substance of its earlier proposal or devise a new "permanent arrangement" for Boston and Providence which, we believe, will provide for the inclusion of that property in the New Haven system. In the meantime it seems preferable, and it certainly accords with the basic philosophy of the *Hoboken* and *Texas-Mexican* cases,

[22] This is the estimated figure in the Report of Administration for 1947 filed by the New Haven after the record in this appeal was printed (Petition, p. 16, note 4).

to allow the Commission the fullest exercise of its function in formulating a plan for the Boston and Providence. The Commission may subsequently issue an order under Section 77(f) authorizing the acquisition of Boston and Providence on such terms as may be found to be reasonable. But resort to Section 5(2) at this stage of the proceedings, even if it were applicable, would be both unnecessary and premature.

Indeed if a plan of reorganization for Boston and Providence is confirmed, it will not be necessary to proceed under Section 5(2) as such, for the final orders of the Commission in the New Haven and Boston and Providence proceedings will be entered under Section 77(f) after the Commission has determined that the terms of the orders will not be inconsistent with the provisions and purposes of the Interstate Commerce Act (R. 135, fol. 404; see this brief, *supra*, p. 38).

It is therefore submitted that Section 5(2) is not and should not be made applicable to the present operation by the New Haven of the lines of Boston and Providence.

CONCLUSION.

Wherefore, the petition should be denied.

Respectfully submitted,

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APPENDIX.

Excerpts From Interstate Commerce Act As Amended.

INTERSTATE COMMERCE ACT, SECTION 1(18) [49 U. S. C. A., SECTION 1(18)]:

"*Extension or abandonment of lines; certificate required.*—No carrier by railroad subject to this chapter shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this chapter over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this chapter, shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment. . . ."

INTERSTATE COMMERCE ACT, SECTION 5(2) [49 U. S. C. A., SECTION 5(2)]:

"*Unifications, mergers, and acquisitions of control.*—(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership,

management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or persons seeking authority therefor shall present an application to the Commission. . . . If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable. . . ."